Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

TERRY D. ALTMAN,
Petitioner,

v.

ROBERT J. KAPTURE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS V. WILHELM
Counsel of Record

2636 DIXIE HIGHWAY
WATERFORD, MI 48328
(248) 618-7280

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN DENYING PETITIONER A CERTIFICATE OF APPEALABILITY.

PARTIES TO THE PROCEEDINGS

Petitioner

Terry D. Altman is an individual with no corporate affiliation. He is a prisoner with the Michigan department of Corrections, No. 228574 and is presently incarcerated in the Parnall Correctional Facility in Jackson, Michigan.

Respondent

Robert J. Kapture is the Warden at the correctional institution where Petitioner was housed when he filed the habeas corpus action pursuant to 28 U.S.C. sec. 2254.

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OPINION BELOW

The Order from which Petitioner seeks review was filed on January 14, 2002, and was not published. A copy of this Order is included in the Appendix (App. A at 1a).

The United States District Court had jurisdiction over this matter pursuant to 28 U.S.C. sec. 2254. The United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. sec. 2254 and 2253.

JURISDICTION OF THE COURT

The Order denying Petitioner's application for a certificate of appealability was entered on January 14, 2002. This Court has jurisdiction to grant this Petition for Certiorari 28 U.S.C. sections 2254, 2253, 1254 and Supreme Court Rule 13.1.

STATUTES INVOLVED

28 U.S.C. sec. 2254 provides in pertinent part:

§ 2254. State custody: remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that --

(A) the application has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. sec. 2253 provides in pertinent part:

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in the habeas corpus proceeding in which the detention complained of arises out of process issued to a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial

showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

THE CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a State of Michigan prisoner. He has a history of suffering from mental illness. Prior to his arrest and subsequent plea based convictions, he received treatment

for his mental problems as far back as 1977, through 1982. His treatment was resumed in 1987/1988, and he remained in treatment during the time of the instant criminal allegations, i.e. January 27, 1992. His mental problems were so substantial as to interfere with his employment and necessitated a medical leave of absence from his employment position as senior vice president at "Dean Witter" in October/November 1990. At the time the offenses allegedly occurred, Petitioner was prescribed and took medications such as: **Lithium, Halcion, Prozac and Wellbutrin**.

In January 1992 Petitioner was arrested and charged with solicitation of murder (Count 1), solicitation of breaking and entering (Count 2) and extortion (Count 3). Petitioner pleaded guilty to Counts 1 and 2 and no contest to Count 3 before a Circuit Court Judge on November 12, 1992. On December 16, 1992, Petitioner was sentenced to concurrent prison terms of 15 to 40 years on Count 1; 40 months to 5 years on Count 2; and 5 to 20 years on Count 3.

Petitioner appealed his conviction and sentences to the Michigan Court of Appeals. On February 25, 1995 the Court of Appeals remanded the matter back to the Circuit Court for an evidentiary hearing on Petitioner's claim that he was deprived of his rights to effective assistance of counsel where counsel did not investigate an insanity and/or entrapment defense, even though counsel was aware that Petitioner had a lengthy history of mental illness and that counsel deprived him of effective assistance of counsel when counsel did not attend the third and final competency hearing.

The evidence produced at the subsequent hearing concisely summarized was:

Oakland County Community Mental Health began diagnosing and treating Petitioner's mental illness from the date of his arrest, January 27, 1992, to the time his custodial status was undertaken by the Michigan Department of Corrections, December, 1992.

Barb Domanski, a social worker, employed by the Oakland County Sheriff's Department, assesses inmates for suicide risks as well as the need of mental health treatment. She testified Petitioner was a suicide risk from the day he entered jail and that a mental health referral was made January 31, 1992. (T, 9/19/96, pp 38-39) The evidence reflected that a suicide was attempted on the evening of Petitioner's arrest. (T, 9/19/96, p 39)

Ruth Hayes-Barba, a social worker with Community Mental Health, and Barb Domanski, had consistent contact with Petitioner. The records reveal that both social workers apprised Dr. Jain of their observations.

Dr. Jain saw Petitioner for the first time on February 4, 1992. (T, 9/19/96, p 88) The doctor's provisional diagnosis was that Petitioner had suffered from a major mental disorder. (T, 9/19/96, pp 93-94) After subsequent visits, Dr. Jain gave a final diagnosis on March 24, 1992 that Petitioner was suffering from "psychosis." (T, 9/19/96, p 94) According to Dr. Jain, when a person

> suffers from a psychosis they "lose touch with reality and it affects their thinking, judgement and actions." (T, 9/19/96, p 94)

Trial counsel recognized Petitioner's mental state would be at issue from the beginning. (T, 9/11/96, p 65) According to trial counsel he focused his attention on obtaining an expert to testify that Petitioner was insane. (T, 9/11/96, p 67)

Trial counsel arranged for psychologist Michael A. Abramski, Ph.D., to examine Petitioner. Dr. Abramski first examined Petitioner on March 21, 1992. Dr. Abramski never conducted a criminal responsibility evaluation; however, he did prepare a report for sentencing which reveals the following in relationship to his March 21, 1992, interview with Petitioner:

> "He first presented himself as extremely disorganized, lethargic and confused. He had difficulty carrying on a continuous narrative, had significant memory problems, was short tempered, angry, labile in mood, despondent and self-destructive. He was on heavy doses of anti-depressants and anti-anxiety medications . . ."

After the visit with Dr. Abramski, trial counsel caused the statutorily required Notice of Intent To Assert An Insanity Defense to be filed in the Oakland County Circuit Court in regards to both files. The filing occurred on or about April 7, 1992 and reads as follows:

> "NOW COMES, TERRY D. ALTMAN, DEFENDANT herein, by and

> through his attorney, (trial counsel) and pursuant to provisions of MCLA 768.20 (a), hereby gives notice of his intent to offer in defense testimony to establish his insanity at the time of the offense alleged in this matter." (Emphasis ours)

In early May, 1992, by virtue of court order, Petitioner was taken to the Forensic Center for a criminal responsibility evaluation. A psychiatrist, Dr. Hartshorn, was to conduct the evaluation; however, due to Petitioner's deteriorated mental state, Dr. Hartshorn was unable to conduct a criminal responsibility evaluation and, instead, evaluated Petitioner for competency to stand trial. In a report dated May 12, 1992, Dr. Hartshorn concluded that Petitioner was incompetent to stand trial. The report of Dr. Hartshorn references that:

> "In speaking with his attorney, this examiner learned that Mr. Altman appeared moderately withdrawn during a legal consultation three weeks ago, and even more withdrawn during a visit yesterday. On that occasion, (trial counsel) described his client as virtually uncommunicative, and indicated to this examiner that he had been entertaining the idea of seeking a court order for a competency evaluation. He also advised the examiner that his client had made one suicide attempt shortly after being jailed, and has continued to report suicide ideation to him."

Competency proceedings were conducted on May 27, 1992, at which time Dr. Hartshorn testified that, in her opinion, Petitioner was incompetent to stand trial. A second

hearing followed, allowing for a prosecution's competency evaluation. Pursuant to the order for another competency evaluation, psychologist, Charles Clark evaluated Petitioner on June 1, 1992, for the prosecution, and concluded Petitioner was competent. This testimony was taken on June 24, 1992. The June 24, 1992 hearing was adjourned to allow for a third competency evaluation which was performed at the Forensic Center by psychologist Holden. The defense attorney failed to have Petitioner evaluated for competency by an independent examiner. All three examiners were state employed or hired and paid by the prosecution.

On June 30, 1992, pursuant to Court Order, Petitioner was evaluated for competency by Carol Holden, a psychologist at the Forensic Center. According to her evaluation, Petitioner was competent to stand trial.

On July 1, 1992, the third, tie breaking, "critical stage" competency hearing was convened. The record reflects that trial counsel did not appear at these proceedings. (T, 7/1/92) The July 1, 1992, competency hearing transcript does not reflect that Petitioner, Terry Altman, was present for these proceedings. The Court concluded Petitioner was competent. (T, 7/1/92, p 5)

At the September, 1996, evidentiary hearing, attorney Thomas V. Wilhelm was qualified as an expert in the field of criminal law. (T, 9/20/96 p 54) He testified that no criminal evaluation of Mr. Altman was conducted. He further testified:

> MR. WILHELM: Okay. Let me make two comments, okay. First, and this is why I think Mr. Mogill may have made a mistake, or something I would not have done. In the same

> situation, the same set of facts, for the attorney, who is not a psychologist or a psychiatrist, to make the decision that an insanity defense does not exist where the criminal responsibility examination has not been done by someone competent to do it -- a doctor, let's say. I think is not fully exploring that defense. . . . Pg. 92: Dr. Abramski saw him, but my understanding is, that was for the purpose of preparing a presentence report to give the Judge a presentence evaluation. Pg. 93: And I don't see anything here, that I have, that indicates on what basis the defense of insanity was abandoned.

Attorney Wilhelm's testimonial conclusion was supported by the testimony of Psychiatrist, Dr. Emanual Tanay, M.D. Dr. Tanay, Petitioner's forensic expert in this matter, testified after reviewing all of the pertinent documents, in this case that he was of the opinion there was a link between Petitioner's alleged criminal conduct and his mental illness. (G.H. Trans., September 17, 1996, pp 19-20) He testified that he was of the opinion that a criminal responsibility evaluation should have been conducted. (G.H. Trans., pp 22-24) He further testified the attorney is not the proper person for making the decision regarding criminal responsibility, especially where there is a history of mental illness. (G.H. Trans., p 21) Dr. Tanay stated:

> "I think a lawyer cannot deal with the client where there is an issue of criminal responsibility without the assistance of a Forensic Psychiatrist . . . there are legal standards for it, that this is a requirement that when there is an issue of criminal

responsibility that input from a proper qualified forensic expert is essential."

Dr. Tanay testified that Petitioner was a chronically mentally ill person. (G.H. Trans., September 17, 1996, p 18) He testified that Petitioner's alleged criminal conduct was in causal relationship to his mental illness and that there was a basis to assert some type of defense based on the fact that there was a causal relationship between the mental illness and the alleged criminal conduct, i.e. entrapment. (G.H. Trans., p 19) In this regard, Dr. Tanay was of the opinion that either insanity and/or diminished capacity should be asserted as a defense. (G.H. Trans., pp 34, 78-79) He further opined that Petitioner's mental illness predisposed him to being easily suggestible and influenced by the nascent relationship Petitioner suffered with Trooper C.J. Maier. (G.H. Trans., p 19) People v Killian, 117 Mich. App 220 (1982).

Finally, Dr. Tanay expressed the opinion that due to mental illness Petitioner was unable to competently plead guilty. (G.H. Trans., p 19) Dr. Tanay was of the opinion that a forensic psychiatric examination of Mr. Altman should have been conducted for the purposes of criminal responsibility, to assess the ability to plead guilty, and to evaluate the psychiatric aspects of entrapment. (G.H. Trans., p 23) According to Dr. Tanay, no Criminal Responsibility Evaluation was conducted in this matter. Petitioner never waived his right or refused to participate in the court ordered Criminal Responsibility Evaluation.

On March 7, 1997, the Circuit Court Judge issued an Opinion and Order denying Petitioner relief. The Court in its opinion did not discuss the testimony of the witnesses presented by the Petitioner. On March 20, 1998, the

Michigan Court of Appeals in an unpublished opinion affirmed Petitioner's convictions and sentences.

On May 13, 1998, a delayed application for leave to appeal was filed with the Michigan Supreme Court. That Court denied relief on February 25, 1999. A Motion for Reconsideration was filed *propria persona* with the Michigan Supreme Court. That Motion was denied on May 25, 1999.

On January 24, 2000, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. sec. 2254 in the United States District Court for the Eastern District of Michigan Southern Division. The Michigan Attorney General filed a Response and Petitioner filed an Answer to the Attorney General's response on November 30, 2000.

On May 31, 2001, the United States District Court Judge entered a Memorandum Opinion and Order and a Judgement denying Petitioner's Petition for Writ of Habeas Corpus. The Petitioner filed a Petition For Certificate of Appealability with the United States District Court. The District Court Judge denied the Petition and Petitioner filed a Motion for a Certificate of Appealability with the Sixth Circuit Court of Appeals.

On January 14, 2002, the Sixth Circuit Court of Appeals entered an Order denying Petitioner's application for a Certificate of Appealability.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE ONLY STATE COURT DECISION DISCUSSING PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THE UNITED STATES DISTRICT COURT'S DENIAL OF HIS PETITION FOR WRIT OF HABEAS CORPUS, CONTRAVENES THIS COURT'S DECISION IN WILLIAMS V. TAYLOR AND STRICKLAND V. WASHINGTON.

Under the AEDPA, the standard of review, of a State Court decision, is governed by 28 U.S.C. sec. 2254(d) aNd the recent Supreme Court decision of Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed 2d, 389 (2000).

In Williams v. Taylor, supra, the Court explained that the "contrary to" and "unreasonable application" clauses of sec. 2254(d)(1) have independent meaning. Id., at 404, 120 S.Ct. 1495.

A state court decision will be "contrary to" the Supreme Court's clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases" or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Id. at 407-408, 120 S.Ct. 1495. A state court decision will be an "unreasonable application of" the Court's clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case" Id. at 407-408, 120 S.Ct. 1495.

The federal habeas courts making the 'unreasonable application' inquiry "should ask whether the state court's application of clearly established federal law was objectively unreasonable" Id. 409, 120 S.Ct. 1495. Distinguishing between an unreasonable and an incorrect application of federal law, the court clarified that even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if the application is also objectively unreasonable. Id. at 410-411,120 S.Ct. 1495.

THE STATE COURT'S DECISION

The state, Circuit Court Judge, in his Opinion regarding Defendant's Claim of Ineffective Assistance of Counsel correctly identified the federal rule for determining a claim of ineffective assistance of counsel. (Opinion, p.9, App.), however, he applied it unreasonably to the facts and controlling federal law. His application of the standard set forth in Strickland v. Washington was objectively unreasonable in that he did not consider the testimony of Petitioner's witnesses who testified:

> MR. WILHELM: Okay. Let me make two comments, okay. First, and this is why I think Mr. Mogill may have made a mistake, or something I would not have done. In the same situation, the same set of facts, for the attorney, who is not a psychologist or a psychiatrist, to make the decision that an insanity defense does not exist where the criminal responsibility examination has not been done by someone competent to do it -- a doctor, let's say. I think is not fully exploring that defense. . . . Pg. 92: Dr. Abramski saw

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> "[I] think a lawyer cannot deal with the client where there is an issue of criminal responsibility without the assistance of a Forensic Psychiatrist . . . there are legal standards for it, that this is a requirement that when there is an issue of criminal responsibility that input from a proper qualified forensic expert is essential." People v Savoie, 419 Mich. 118 (1984), People v Chapman, 165, Mich. App 215 (1987).

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In Strickland v Washington, 446 U.S. 668 (1984) this Court held that, to establish ineffectiveness an accused must show (1) that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Federal Constitution's Sixth Amendment, and (2) prejudice by showing that there is a reasonable probability that but for counsel's unprofessional error the result of the proceedings would have been different.

The testimony of Petitioner's witnesses in the state Circuit Court established that trial counsel's performance fell below an objective standard of reasonableness in that:

(1) Trial counsel abandoned the insanity defense in the face of overwhelming evidence that Petitioner was seriously mentally ill before, during and after the dates of the alleged offense. In fact, the Oakland County Jail Psychiatrist, Dr. Jain, recorded and testified Petitioner suffered a "major mental disorder" and was psychotic.

(2) He abandoned the insanity, diminished capacity, entrapment and the other defenses on his own sans training or accreditation in psychiatry without obtaining a Court Ordered criminal responsibility evaluation.

(3) He abandoned the insanity defense by withdrawing the Notice to Conduct such defense on August 12, 1992, without Petitioner's knowledge and approval.

(4) Contrary to U.S. v Cronic, 466 U.S. 648 (1984) he was absent from the third, deciding, tie breaking, "critical stage," and final competency hearing -- having waived Petitioner's right to the hearing without Petitioner's knowledge or approval.

(4) Trial counsel failed, prior to stipulation at the aforementioned competency hearing, to obtain and review the tape recordings of the Petitioner made by the police officer during his investigation of the alleged offenses of which the prosecutor acknowledged that defendant "seemed out of it." (see, App. F) Therefore counsel's stipulation, failure to attend the hearing and waiver of the insanity defense was not a strategic decision as it was not based on an investigation of the facts which would lead to an informed decision.

The State Circuit Court's failure to consider the above facts which established that trial counsel's representation of Petitioner was deficient, or falling below the objective standard of reasonableness, Strickland, supra., made the State

Judge's application of the established law, i.e. Strickland, objectively unreasonable.

THE UNITED STATES DISTRICT COURT'S OPINION

The United States District Court in its Memorandum Opinion and Order denying Petitioner's Petition for Habeas Corpus identified the correct federal rule (Memorandum p 4), however, the Court's conclusion that the "state court decisions were not contrary to or unreasonable applications of, Strickland or Hill v. Lockhart." (Memorandum P 13) is incorrect. The district court's decision is contrary to established federal law and an unreasonable application of the law for the basic reason that the state court decision was erroneous. The decision to waive the insanity defense could not be made without a court ordered criminal responsibility being conducted.

The District Court Judge has let stand the egregious injustices committed against Petitioner as evidenced by the record in this case. The district court is no better trained or accredited than Petitioner's trial counsel to determine if Petitioner is criminally responsible, without the findings of the Criminal Responsibility Evaluation Ordered by the circuit court, but never conducted. Furthermore, the district court's application of established law, Strickland and Cronic, is both incorrect and objectively unreasonable. Williams v Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed 2d, 389 (2000). The District Court's decision is contrary to established federal law which has considered the claim of ineffective assistance of counsel on substantially the same facts.

In Genius v Pepe, Jr., 50 F.3d 60 (1st Cir. 1995), the issue was:

> "That the district court erred in rejecting the defendant's claim that he was denied effective assistance of counsel in that counsel did not pursue the defense of lack of criminal responsibility." (Insanity).

In reversing, the Court stated, "where insanity would have been a complete defense, it was inexcusable not to raise it." (Pg. 61). The Court went on to state:

> "To forego even exploring a possible complete defense because offering it might weaken a partial one (reducing murder one to murder two) seems an extraordinarily unbalanced choice. Whether counsel made it deliberately (as to which there was no evidence) or by default, we cannot find it within the most tolerant standard of competence. And particularly so when there already was some evidence of insanity on the record."

In Strickland, supra, the Court anticipated situations where, like here, decisions are made with less than a thorough investigation stated:

> "Strategic choices made after less than complete investigations are responsible precisely to the extent that reasonable professional judgement supports the limitations on investigation." Id., at 690--691, 104 S.Ct. at 2066.

The case of DeLuca v Lord, 77 F.3d 578 (2nd Cir. 1996), is directly on point. In Deluca, supra, a federal habeas action from a State court conviction for murder, Petitioner

argued she was denied effective assistance of counsel where counsel abandoned the defense of extreme emotional disturbance (EED). The Court, in affirming the district court's granting of her petition, found that counsel rendered ineffective assistance of counsel by rejecting the EED defense prematurely, for inadequate reasons and without giving it serious consideration, " that the decision was not a strategic one and that the defendant was prejudiced as the abandoned defense could have changed the result in Petitioner's favor."

The Courts have found prejudice in other cases where counsel did not investigate potential psychological evidence. As stated in Baxter v Thomas, 45 F.3d 1501 (11th Cir. 1995):

> "Psychiatric mitigating evidence 'has the potential to change the evidentiary picture.' Middleton, 849 F2d at 495. We have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence. See Stephens v Kemp, 846 F2d 642, 653 (11th Cir.) ("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital), cert. denied, 488 U.S. 872, 109 S.Ct. 189, L.Ed.2d 158 (1988); Blanco, 943 F2d at 1053; Middleton, 849 F2d at 495; Armstrong v Dugger, 833 F2d 1430, 1432-1434 (11th Cir. 1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was 'mentally retarded and had organic brain damage.')"

In the present case, abandonment of the criminal responsibility examination deprived defendant of a total

defense. If he had been examined for the purpose of an insanity defense, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," 466 U.S. at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052. Likewise, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," Strickland, supra, regarding the affirmative defenses of diminished capacity and entrapment.

Other cases are in accord. In Bouchillon v Collins, 907 F.2d 589 (5th Cir. 1990), the Fifth Circuit held that counsel tendered ineffective assistance of counsel where he failed to investigate his client's sanity at the time of the offense, and his competency during plea proceedings:

> In Bouchillon, the defendant was a Vietnam veteran charged with aggravated robbery. It was undisputed that he suffered from posttraumatic stress disorder which developed after his return from Vietnam. In addition, there was evidence that he had been abused as a child and abandoned by alcoholic parents.
>
> On habeas review, the court affirmed the district court's determination that the defendant had in fact been incompetent to render a guilty plea. Therefore, the court had no problem finding that counsel's failure to investigate his client's mental problems prejudiced the defendant, because the guilty plea was ineffective. The court noted, "even if Bouchillon were to fail to prove his incompetency by a preponderance of the evidence, it is still possible that he raised

sufficient doubt on that issue to satisfy the prejudice prong on his ineffective assistance of counsel claim."

Regarding the performance prong of the Strickland test, the court found that counsel's failure to do any investigation whatsoever into the defendant's history of mental illness was not reasonable. At the evidentiary hearing before the district court, trial counsel testified that the defendant had told him he "had mental problems, had been institutionalized, and was on medication." Counsel claimed that he did not investigate these facts because they arose during a discussion of the possibility of raising an insanity defense at trial, which counsel felt would not succeed. Counsel "made no phone calls, did not request Bouchillon's medical records, did not talk to witnesses regarding Bouchillon's mental problems -- in short, he did no investigation of any kind because he said that Bouchillon appeared rational." The court concluded that this was not a reasonable trial tactic:

To do no investigation at all on an issue that not only implicates the accused's only defense, but also his present competency, is not a tactical decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum.

The court placed special emphasis on the fact that the evidence which counsel failed to

investigate concerned his client's mental health. First the court noted that:

> Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's sanity once he has reason to believe an investigation is warranted because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court.

Second, the court observed that a failure to alert the court to the defendant's mental condition is unlikely to be corrected in the future, especially when the defendant enters a guilty plea and is typically "removed from the observation of the court." For these reasons, the court concluded that "[i]t *must* be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problems."

In Parkus v Delo, 33 F.3d 933 (8th Cir. 1994), the Eighth Circuit determined that:

> The defendant raised sufficient evidence supporting his claim of ineffective assistance of counsel to warrant an evidentiary hearing before the district court. Specifically, the defendant claimed that counsel's inadequate investigation into evidence of his diminished

mental capacity constituted ineffective assistance of counsel.

In Parkus, the defendant was convicted of first--degree murder for the strangulation death of a fellow inmate at a state penitentiary. At trial, his counsel raised the defense that the defendant lacked the capacity to "deliberate," the required mental state for first-degree murder. This defense was based on the defendant's history of childhood abuse and institutionalization since age four. Although trial counsel attempted to obtain the defendant's mental health records, he ceased investigations upon being told by the state's Division of Youth Services that the records had been destroyed.

At trial, some evidence of the defendant's mental incapacity was presented, including testimony of the defendant's childhood abuse by an uncle, and the statements by a psychiatrist who testified that the defendant suffered no "mental disease or defect," but that he *did* possess diminished mental capacity which prevented him from "deliberating" upon the murder. The jury rejected the defendant's claim that he was unable to deliberate and convicted him of first-degree murder.

On habeas appeal, the defendant presented evidence, discovered by habeas counsel, that his mental records were in fact not destroyed. The records, he argued, provided significant additional evidence that he did lack the

capacity to deliberate as required for first--degree murder. The district court rejected defendant's request for an evidentiary hearing and dismissed his claims as either procedurally barred or meritless.

The Eighth Circuit reversed this holding and determined that the defendant had demonstrated both cause and prejudice sufficient to warrant an evidentiary hearing. While emphasizing that its conclusions for the purpose of a cause and prejudice inquiry were not determinative of the underlying ineffective assistance claim, the court did recognize that counsel's failure to obtain the mental health records actually prejudiced the defendant. Applying Strickland's standards, the court reasoned that the additional evidence would have provided the jury with data indicating that the defendant suffered from mental illness, mental retardation and psychosis. In addition, the psychiatrist who testified at trial provided an affidavit that had he reviewed the defendant's mental records, he would have testified that the defendant did suffer from mental disease or defect. The court concluded:

> a reasonable probability exists that the jury, if given the opportunity to consider [the defendant's] additional evidence, would not have convicted him of first degree murder at the guilt phase, or otherwise would have imposed the death penalty at sentencing.

Accordingly, the court remanded for an evidentiary hearing.

In Michigan, "Neither a defendant who may be incompetent, nor his counsel, may waive a determination as to Defendant's capacity to stand trial. People v Spry, 74 Mich App. 584 (1977). "The criminal trial of an incompetent defendant violates due process." Cooper v Oklahoma, ___ U.S. ___ 116 S.Ct. 1373, 1376, 134 L.Ed.2d 498 (1996) (Quoting Medina v California, 505 U.S. 437, 453, 112 S.Ct. 2572, 2581, 120 L.Ed.2d 353 (1992). Here Attorney Mogill waived a determination as to defendant's capacity to stand trial by Mogill's failure to attend the third competency hearing. People v Spry, supra.

The United States Supreme Court has declared that the constitutionally protected right to counsel applies to all critical stages of the proceedings, against one accused of crime, defining the term "critical" to extend to any stage of the prosecution, formal or informal, in Court or out, where counsel's absence might derogate from the accused's right to a fair trial. Arsenault v Massachusetts, 89 S. Ct. 35; Gilbert v California, 87 S. Ct. 1951; Pointer v Texas, 85 S. Ct. 1065; Escobedo v Illinois, 87 S. Ct. 1758; Colombe v Connecticut 81 S. Ct. 1860.

A judgement of conviction of one who did not effectively waive his constitutional right to the assistance of counsel for his defense is void as having been rendered without jurisdiction. United States v Morgan, 74 S. Ct. 247. In the absence of special authority, a stipulation that operates as a surrender of substantial rights of a client will not be upheld by the courts. 7 Am Jur 2d, 203-204.

Petitioner has made "a substantial showing of the denial of a constitutional right" and this Court should grant Petitioner's Petition for Writ of Certiorari and remand the matter to the Sixth Circuit Court of Appeals with instructions to grant Petitioner a certificate of appealability.

II. THE COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS SHOULD REMAND THE MATTER TO THE SIXTH CIRCUIT COURT OF APPEALS WITH DIRECTIONS FOR A FULL BRIEFING AND ARGUMENT ON PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THE PUBLIC, EVEN THE MENTALLY ILL, HAVE AN INTEREST IN AND A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE FAIRNESS OF JUDICIAL PROCEEDINGS.

In Frazier v Heebe, 482 U.S. 641, 647 (1987) this Court stated "The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system . . ." Here Petitioner's counsel unreasonably abandoned his obviously mentally ill client's complete defense of insanity without obtaining a court ordered criminal responsibility examination. Because the court ordered criminal responsibility examination was not done, the decision to abandon the defense was not reasonable. ". . . [s]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v Washington, 446 U.S. 668 at 690 (1984). Here Petitioner's witnesses in the State Circuit Court hearing testified that in

their professional judgement trial counsel's abandonment of the insanity defense was not reasonable under Strickland. Federal Circuit Court cases cited above (Agreement 1) support Petitioner's claim that trial counsel rendered him ineffective assistance of counsel. Fundamental fairness requires that Petitioner's claim be given a full and fair review by the federal court system.

To protect the integrity of the federal court system this court in the exercise of its supervisory power should grant Petitioner's Petition for Certiorari and remand to the Sixth Circuit Court of Appeal with instructions to issue petitioner a certificate of appealability.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the matter remanded to the Sixth Circuit Court of Appeals with instructions for the court ot issue a certificate of appealability.

Respectfully Submitted,

Thomas V. Wilhelm (P29436)
Counsel of Record
Attorney for Petitioner
2636 Dixie Highway
Waterford, MI 48328
(248) 618-7280

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1924

[Filed January 14, 2002]

TERRY D. ALTMAN,)
)
Petitioner-Appellant,)
)
v.)
)
ROBERT J. KAPTURE,)
)
Respondent-Appellee.)

Before: MARTIN, Chief Judge.

ORDER

Terry D. Altman, a Michigan prisoner proceeding through counsel, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254. Altman requests a certificate of appealability pursuant to Fed. R. App. P. 22(b).

A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a

constitutional right." 28 U.S.C. §2253(c)(2). Upon review, the court concludes that Altman has failed to make such a showing. The application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 00-CV-71091-DT
HONORABLE DENISE PAGE HOOD

[Filed May 31, 2001]

TERRY D. ALTMAN,)
)
Petitioner,)
)
v)
)
ROBERT J. KAPTURE,)
)
Respondent.)
)

MEMORANDUM OPINION AND ORDER

I. Introduction

Pending before the Court is petitioner Terry D. Altman's habeas corpus petition. Petitioner is an inmate at the Gus Harrison Correctional Facility in Adrian, Michigan.

On November 12, 1992, Petitioner pleaded guilty in

Oakland County Circuit Court to solicitation to commit murder, Mich. Comp. Laws Ann. § 157b(2), and solicitation to commit a breaking and entering of an occupied dwelling, Mich. Comp. Laws Ann. §750.157b(3)(a). Petitioner pleaded *nolo contendere* to extortion, Mich. Comp. Laws Ann. §750.213. The events leading to Petitioner's convictions have been summarized by the trial court as follows:

> [Petitioner] had become acquainted with an employee of a local gas station, Frank Partica, an ex-convict, and in 1991, [Petitioner] began soliciting Partica to break and enter into the apartment of [Petitioner's] ex-girlfriend for the purpose of stealing expensive items that [Petitioner] had given to the ex-girlfriend as gifts, and also possibly to disfigure the ex-girlfriend. [Petitioner] also stated that he might want to have a former business associate killed.
>
> Partica contacted the Michigan State Police, and Sgt. C. J. Maier was assigned to investigate. With Partica's assistance, Maier posed as a former fellow ex-convict who was available to perform the criminal acts solicited by [Petitioner]. [Petitioner] contacted Maier and they met at a local restaurant in January, 1992.
>
> [Petitioner] introduced the subject of Partica and the apartment job. [Petitioner] described what he wanted Maier to do. When

Maier asked [Petitioner] if he wanted Maier to just rob the apartment, or also to hurt the ex-girlfriend or "put her away", [Petitioner] responded: "I got another guy, I'd wanna put away. I got another guy who I'll put away." [Petitioner] also stated he did not want to physically hurt his ex-girlfriend. Finally, [Petitioner] expressed concern about Maier doing a "clean" job so that it would not come back to him, and also discussed his expectation of police contact after the completion of the B and E, and how he had been practicing looking "dumb".

After Maier had supposedly completed the B and E, Maier and [Petitioner] met again, on January 27, 1992. After they had discussed the details of the supposed B and E, [Petitioner] solicited Maier to kill a former business associate. [Petitioner] stated his intention to collect on an outstanding insurance policy on the intended victim and to use the policy benefits to pay off outstanding debts. Maier and [Petitioner] negotiated payment terms for the murder, and then proceeded in separate cars to [Petitioner's] bank, where he withdrew the money, drove down an alley, left the money in an envelope on a telephone pole, pointed to it, and drove away.

[Petitioner] was arrested as he left the scene and was charged with one count of

> solicitation of murder and one count of solicitation of breaking and entering an occupied dwelling. In a separate case, he was charged with one count of extortion.

People v. Altman, Nos. 92 115042 FC and 92 115146 FH, at 2-4 (Oakland County Cir. Ct. Mar. 7, 1997)(internal citations omitted). The trial court sentenced Petitioner to concurrent prison terms of fifteen to forty years for solicitation to commit murder, forty months to five years for solicitation to commit breaking and entering, and five to twenty years for extortion.

Petitioner appealed his conviction and sentence and then moved to remand his case for a hearing on whether defense counsel had provided ineffective assistance.[1] The court of appeals granted a remand, and in September of 1996, the trial court conducted an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel. The trial court later concluded in a written opinion that Petitioner was not deprived of the effective assistance of counsel. The Michigan Court of Appeals reached the same conclusion and affirmed Petitioner's conviction and sentence. *See People v. Altman,* No. 160952 (Mich. Ct. App. Mar. 20, 1998). The Michigan Supreme Court denied leave to appeal. *See People*

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[1] While Petitioner's case was pending in state court, he filed a federal habeas corpus petition, which this Court dismissed without prejudice for failure to exhaust state court remedies. *See Altman v. Hofbauer,* No. 95-CV-72656-DT (E.D. Mich. Aug. 22, 1995). Petitioner filed a second habeas petition, which United States District Judge Richard A. Enslen dismissed as frivolous. *See, Altman v. Jones,* No. 96-CV-538 (W.D. Mich. Aug. 29, 1996).

v. Altman, No. 112164 (Mich. Sup. Ct. Feb. 25, 1999).

On February 29, 2000, Petitioner filed the pending habeas corpus petition pursuant to 28 U.S.C. §2254. The issues are:

I. Whether Petitioner was deprived of his liberty where his trial attorneys were ineffective on several points; failed to present valid defenses to the charges in violation of both state and federal constitutional guarantees of effective assistance of counsel under the sixth and fourteenth amendments.

A. Failed to investigate an insanity defense.

B. Failed to assert a diminished capacity defense.

C. Failed to investigate and assert a defense of entrapment, and a claim-of-right defense to breaking and entering and extortion.

II. Whether the cumulative failures of defense counselors to prepare for trial constitutes a structural error defect in

> the adversary mechanism as a whole, rendering the outcome of the plea-based conviction unreliable and suspect under the Sixth and Fourteenth Amendments.

The Court may grant the writ of habeas corpus only if the state court's adjudication of these claims on the merits-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d); *see Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). Respondent urges the Court to deny the habeas petition on the ground that the state court decisions were not unreasonable applications of Supreme Court law or unreasonable determinations of the facts.

II. Discussion

A. Alleged Ineffective Assistance of Counsel

Petitioner's first claim is that his trial attorney failed to investigate and present a valid defense to the charges. Petitioner claims that he would have insisted on going to trial

if a viable defense and the prosecutor's burden of proof had been explained to him.

To prevail on his claim, Petitioner must demonstrate that defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To satisfy the deficient-performance prong, Petitioner must show that his attorney's representation fell below an objective standard of reasonableness or outside the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart,* 474 U.S. 52, 56-59 (1985). The prejudice prong focuses on whether defense counsel's constitutionally ineffective performance affected the outcome of the plea process. *Id.* at 59. Petitioner must show that, but for counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances,

> applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

1. Insanity

Petitioner alleges that he has a history of mental illness and that his attorney should have investigated and presented an insanity defense. In Michigan, mental illness is defined "as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life." CJI2d 7.9(2). To prove insanity due to mental illness, defendants must demonstrate that they lacked substantial capacity to appreciate the wrongfulness of their conduct or that they lacked the ability to conform their conduct to the requirements of law. Mich. Comp. Laws Ann. §768.21a(1); *People v. Crawford,* 89 Mich. App. 30, 36 (1979). An insanity defense can be proved only by expert testimony, not by lay witnesses. *People v. Savoie,* 419 Mich. 118, 128 (1984).

Psychologist Michael Abramsky examined Petitioner on March 21, 1992. Shortly afterwards, defense counsel filed a notice of intent to assert the insanity defense.

On May 12, 1992, Petitioner was sent to the Forensic Center for a criminal responsibility examination with psychiatrist Mary Hartshorn. Dr. Hartshorn was unable to complete her evaluation because she could not elicit cogent information from Petitioner, who claimed not to remember either the charges against him or innocuous things about his

past. Dr. Hartshorn concluded at the first session of the competency hearing that Petitioner was incompetent to stand trial. At the conclusion of the session, the trial court granted the prosecutor's request for an independent examination of Petitioner. *See* Competency Hearing May *27,* 1992, at 6-9, 12, 39-41.

Clinical psychologist Charles Clark interviewed Petitioner on June 1, 1992. He testified at the continuation of the competency hearing that Petitioner was malingering, i.e., feigning mental illness. Dr. Clark thought that Petitioner was competent to stand trial. The trial court then granted defense counsel's request to refer Petitioner to the Forensic Center for a third opinion. *See* Competency Hearing June 24, 1992, at 4-7, 52-54.

Psychologist Carole Holden subsequently examined Petitioner and concluded that Petitioner was competent to stand trial. The trial court received Dr. Holden's written report into evidence at the third and final session of the competency hearing. The trial court then ruled that Petitioner was competent to stand trial. *See* Court's Ruling on Competency, July 1, 1992, at 5.

Defense counsel subsequently withdrew his notice of intent to assert an insanity defense because, in his opinion, Petitioner's mental problem did not constitute legal insanity. *See* Proceeding on December 16, 1992, at 39-40. Petitioner pleaded guilty and *nolo contendere* three months later.

At the *Ginther* hearing in 1996, Petitioner testified that he received psychiatric care from 1977 to 1982, from 1987 to

1988, and before his arrest. *See* GH Sept. 19, 1996, at 84-85, 112.[2] Barbara Domanski testified that Petitioner was placed on suicide watch for about three-quarters of the time that he was in jail. *See id.* at 40.

Psychiatrist Asha Jain testified that she first saw Petitioner at the jail on February 4, 1992. Her initial diagnosis was major depression, single episode; her subsequent diagnosis was major depression with psychotic episode. Dr. Jain prescribed average or low dosages of antidepressants and antipsychotic medication for Petitioner. She conceded that, although Petitioner's condition was chronic, this did not mean that he could not distinguish between right and wrong or could not control his behavior. She conversed with Petitioner's trial attorney more than once, but she was unable to remember what information the attorney had requested. *See id.* at 86-89, 96-102, 142-44, 157-59.

Forensic psychiatrist Emanuel Tanay testified that Petitioner was chronically mentally ill and that there was a causal relationship between Petitioner's criminal conduct and his mental illness. Dr. Tanay also believed that Petitioner's mental illness pre-disposed him to being influenced by undercover detective C. J. Maier. Dr. Tanay did not examine Petitioner. He opined, however, that an examination of

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[2] In Michigan, evidentiary hearings on claims of ineffective assistance of counsel are called Ginther hearings pursuant to *People v. Ginther*, 390 Mich. 436 (1973). For purposes of this opinion, "GH" refers to the transcript of the Ginther hearing, which was held on September 11, 17, 19, and 20, 1996.

Petitioner shortly after the crime could have resulted in the conclusion that Petitioner was insane, had diminished capacity, or was susceptible to entrapment at the time of the crime. *See* GH Sept. 17, 1996 (A.M. session), at 18-19, 34-35.

Petitioner's trial attorney, Kenneth Mogill, testified that he was aware of Petitioner's mental problems and that he considered many possible defenses. Mogill ruled out an insanity defense for a number of reasons. First, he was unable to find an expert witness who was willing to testify that Petitioner was legally insane at the time of the crime. Second, he did not think that the jurors would be convinced by an insanity defense, and an unsuccessful defense, in his opinion, would have resulted in a more severe sentence than the one Petitioner received. He anticipated that, if Petitioner had gone to trial, the victims would have given emotionally compelling testimony, and the prosecution would have produced expert witnesses who testified that Petitioner was sane and was feigning mental illness. Finally, the trial court had ruled that the prosecution could introduce damaging evidence at trial concerning Petitioner's other acts.

Defense counsel's strategy was to use information about Petitioner's mental state to argue in mitigation of his sentence. To that end, he prepared a sentencing letter with multiple attachments for the sentencing court's consideration. *See* GH Sept. 11, 1996, at 32-33, 43-46, 5255, 71-72, and 79.

Lawrence Kaluzny testified that Petitioner hired him as co-counsel to Mogill. Kaluzny thought that Petitioner

received the best chance for leniency by pleading guilty versus going to trial. *See* GH Sept. 17, 1996 (P.M. session), at 3, 13-14.

It is clear from the record that defense counsel investigated the defense of insanity and consulted with Petitioner regarding possible defenses. None of the mental health professionals who knew or interviewed Petitioner at the approximate the time of the crimes stated that Petitioner lacked substantial capacity to appreciate the wrongfulness of his conduct or that he lacked the ability to conform his conduct to the requirements of law.[3] In fact, Petitioner's own expert, psychologist Michael Abramsky, stated in a presentence evaluation report that Petitioner did not meet the statutory requirement for insanity. *See* Petitioner's Response to the State's Answer, Appendix F, at 6.

Because an insanity defense can be proved only by expert testimony, *Savoie,* 419 Mich. at 128, Petitioner's trial attorney was not ineffective for failing to raise the defense. Even Petitioner's present attorney testified at the Ginther hearing that he could not have raised a legitimate insanity defense without an expert witness. *See* GH Sept. 20, 1996, at 75-77.

The decision to focus on mitigating the sentence was

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[3] Petitioner's psychotherapist as of November of 1993 stated in a letter dated November 1, 1995, that, in his opinion, Petitioner was legally insane at the time of the alleged incidents. *See* Petition for Writ of Habeas Corpus, Appendix 1. Petitioner did not call Dr. Pozner as a witness at the Ginther Hearing.

a reasonable strategy, given the overwhelming evidence against Petitioner. Therefore, the state court determinations that defense counsel was not ineffective were reasonable applications of Supreme Court precedent. Petitioner is not entitled to habeas corpus relief on the ground that his attorney should have raised an insanity defense.

2. Diminished Capacity

Petitioner alleges next that his attorney should have investigated and asserted a defense of diminished capacity to the solicitation and extortion crimes, which were specific intent crimes. "Evidence of diminished capacity is only relevant to the question of a defendant's ability to form the specific intent necessary to commit a particular crime." *People v. Jones,* 151 Mich. App. 1, 5 (1986).

Defense counsel testified at the Ginther hearing that the facts in this case ruled out the possibility of using a diminished capacity defense. In defense counsel's opinion, there was overwhelming evidence that Petitioner knew what he wanted and did not want done. *See* GH Sept. 11, 1996, at 53.

Defense counsel's opinion is supported by the record. Frank Partica and C. J. Maier testified at the Ginther hearing that Petitioner asked them to burglarize his girlfriend's apartment. Petitioner also asked Maier to kill T. Falcon Napier. Petitioner wanted it done in such a way that it looked like an accident. *See* GH 9/19/96, at 14-15,162-73.

In the state court's words, "the evidence of

[Petitioner's] actual conduct so clearly established his specific intent as to each crime as to justify counsel's strategic conclusion that a viable diminished capacity defense could not be presented." *Altman,* Mich. Ct. App. No. 160952, at 2. Therefore, the state court's conclusion that defense counsel was not ineffective for failing to raise a diminished capacity defense was a reasonable application of Supreme Court precedent, and Petitioner is not entitled to the writ of habeas corpus.

3. Entrapment

Petitioner contends next that defense counsel should have investigated and asserted a defense of entrapment because there was no proof that he formulated the plan to murder. He claims that Maier first suggested the killing, induced him to pay money by offering a discount, and pretended to have committed the breaking and entering.

In Michigan, "[o]rdinary entrapment is found where either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v. Woods,* 241 Mich. App. 545,555 (2000). The defense excuses "criminal conduct where a government agent has improperly instigated or encouraged the conduct." *Id.*

Petitioner's present attorney, who testified on Petitioner's behalf at the Ginther hearing, stated that he personally did not know whether an entrapment defense existed in this case. *See* GH Sept. 20, 1996, at 70-71.

Petitioner's trial attorney testified at the hearing that entrapment was a non-existent defense and that it would have been a waste of Petitioner's money to pursue the defense. The Michigan Court of Appeals opined that, where the plans to burglarize Petitioner's ex-girlfriend's residence and to murder a former business associate originated with Petitioner, "the mere investigative participation of a police officer, posing as an assassin for hire, could lead at least a minimally competent criminal defense practitioner to the conclusion that a valid entrapment defense did not exist." *Altman,* Mich. Ct. App. No. 160952, at 2 (citing *People v. Butler,* 444 Mich. 965-66 (1994)).

Petitioner alleges that he was not precluded from raising entrapment as a defense just because he was the first to raise the idea of criminal conduct. The record, however, demonstrates that Petitioner did more than suggest the idea. Frank Partica testified at the Ginther hearing that Petitioner gave him $1,500 to induce him to break and enter the home of Petitioner's girlfriend. Petitioner also wanted something done to people who supposedly had taken his money and turned on him. *See* GH Sept. 19, 1996, at 20-21.

Detective C. J. Maier testified that he agreed to pose as the person who would take care of whatever Petitioner wanted to have done. Maier told Partica to have Petitioner call him. On January 20, 1992, Petitioner paged Maier. Later that evening, Petitioner met Maier and solicited the breaking and entering. Maier subsequently pretended to have committed the breaking and entering. Petitioner then asked to see Maier a second time. On January 27, 1992, the two men met, and Petitioner asked Maier to make an accident happen.

Petitioner explained to him that he had lost $65,000 in a business deal and that he would like a tree to fall on his former business associate so that he collect on an insurance policy. Maier offered to do the job for $1,000, but Petitioner offered to pay him $1,000 immediately and another $9,000 if he (Petitioner) was able to collect the insurance proceeds. Petitioner then went to the bank, withdrew some money, and left $1,000 on a telephone pole for Maier. *See id* at 164-74; GH Sept. 20, 1996, at 5, 16-17, 24.

The record indicates that Petitioner actively solicited the crimes and that Maier's conduct was not reprehensible. The facts do not support an entrapment defense. Therefore, defense counsel was not ineffective for failing to raise the defense, and the state court decisions were not unreasonable applications of clearly established federal law.

4. Claim of Right

Petitioner claims to have honestly believed that he was entitled to a portion of his former business associate's proceeds and the expensive gifts he bestowed on his former girlfriend. On that basis, Petitioner alleges that a claim-of-right defense could have been used in connection with the offenses of extortion and solicitation to commit breaking and entering. Petitioner claims that his only intent was to regain control of his property and money.

> [A] claim of right defense arises when there is a dispute regarding a defendant's felonious intent at the time of the taking. According to this defense, if a defendant had a good-faith

> belief that the defendant had a legal right to take the property at issue, then the defendant cannot be convicted because the defendant did not intend to deprive another person of property. The defense applies even if the belief is mistaken or unreasonable.

People v. Cain, 238 Mich. App. 95, 118-19 (2000)(citations omitted). "It is important to note that this claim of right defense merely creates a question of fact for the jury and does not establish an affirmative defense, which would then require the prosecution to prove that [the defendant] *was not* acting under a good-faith belief in a claim of right." *Id.* at 120 n. 10 (emphasis in original).

Both Frank Partica and Detective Sergeant Maier testified in this case that Petitioner said he did not want the items in his former girlfriend's apartment. He merely wanted to keep the girlfriend from having the items. *See* GH Sept. 19, 1996, at 16-17, 170.

Tim Napier testified at the preliminary examination that he had offered to let Petitioner sue him to recover money that Petitioner thought belonged to him. Petitioner had responded by saying that this was a matter "for the streets," not the courts. *See* Preliminary Examination Transcript, Feb. 27, 1992, at 14-15, 20, 58.

The record also establishes that Petitioner contemplated having someone physically harm both his former girlfriend and Napier. Because the facts suggest that Petitioner possessed a felonious intent, defense counsel was

not ineffective for failing to assert a claim-of-right defense.

5. Summary

Petitioner claims that his attorney should have asserted the defenses of insanity, diminished capacity, entrapment, and claim of right. The state courts concluded that the defenses were not viable and that Petitioner was not deprived of the effective assistance of counsel. For all the reasons given above, this Court concludes that the state court decisions were not contrary to, or unreasonable applications of, *Strickland* or *Hill v. Lockhart*. Therefore, Petitioner has no right to habeas relief on the basis of his first claim.

B. The Cumulative Effect of Errors/Right to be Present at Critical Stages

Petitioner's second claim is that the cumulative effect of trial counsel's errors constituted a structural error, which rendered the outcome unreliable and violated his constitutional rights. Because none of defense counsel's alleged errors amounted to ineffective assistance, there is no basis to conclude that there was any cumulative effect here. *Coe v. Bell,* 161 F.3d 320, 340 (6th Cir. 1998), *cert. denied,* 528 U.S. 842 (1999). Nor is this a case in which prejudice may be presumed. *Cf Smith v. Robbins,* 528 U.S. 259, 287 (2000)(presuming prejudice, rather than requiring a defendant to demonstrate it, when (1) there is a complete absence of counsel, (2) the state interferes with counsel's assistance, and (3) counsel is burdened by an actual conflict of interest).

Petitioner nevertheless argues that he was denied his

constitutional right to counsel and his right to be present at critical stages of the proceedings. The basis for this argument is the fact that neither Petitioner, nor his trial attorney, was present at the third session of the competency hearing.

The state courts did not address this claim. Therefore, the Court must determine whether the state court decisions were contrary to federal law, unreasonable applications of clearly established law, or unreasonable determinations of the facts. *Harris v. Stovall,* 212 F.3d 940, 943 (6th Cir. 2000). This independent review remains deferential to the state court's result. *Id.*

Petitioner's Sixth Amendment right to counsel had attached by the time of the competency hearing. *Estelle v. Smith,* 451 U.S. 454, 470 (1981). In addition, he possessed a constitutional "right to be present at any stage of the criminal proceeding that [wa]s critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer,* 482 U.S. 730, 745 (1987).

Petitioner and his trial attorney were present at the first two sessions of the competency hearing. Defense counsel argued that Petitioner was not competent and that he should be treated at the Forensic Center until such time as he was determined to be competent. *See* Competency Hearing May 27, 1992, at 35-39.

The third session of the competency hearing consisted of the trial court's ruling on Petitioner's competency after Carol Holden's written report was received into evidence. The attorneys previously stipulated that: (1) the trial court

could receive in evidence and consider Dr. Holden's report; (2) the trial court could decide the matter of competency on the basis of Dr. Holden's report and the testimony given at the previous two sessions of the hearing; and (3) the prosecutor would not make any arguments. No testimony was taken at the third session, and the prosecutor kept his promise not to raise any substantive arguments on the matter of Petitioner's competence. The trial court then ruled that Petitioner was competent to stand trial. The ruling was based on the conclusions of two out of three experts that Petitioner was competent. *See* Court's Ruling on Competency.

Petitioner's trial attorney explained at the Ginther hearing that he was not present at the third session of the competency hearing because he had read Dr. Holden's report, there was nothing to challenge, and he had no doubt that Petitioner would be found competent. His personal opinion was that Petitioner had been aware of what was happening and had been competent to evaluate and decide for himself what course of action to take. *See* GH Sept. 11, 1996, at 13, 55.

Under the circumstances, Petitioner's and his attorney's presence at the third session of the competency hearing was not necessary to ensure fairness. Arguments, testimony and expert reports were already presented to the trial court and the trial court was only scheduled to rule on whether Petitioner was competent to stand trial. It is this Court's position that in a criminal matter, absent an express waiver from the client, counsel and client must be present at all stages of the proceedings to ensure that the client's rights are protected. However, given the facts in this case, the Court

cannot say that Petitioner's constitutional rights were violated by holding the final session of the competency hearing in his and his attorney's absence. The state court's decision to deny relief was objectively reasonable.

III. Conclusion

Petitioner has failed to shown entitlement to the writ of habeas corpus. Accordingly, the petition for a writ of habeas corpus [docket entry #1] is **DENIED**.

Also pending before the Court is Petitioner's motion to file a response in excess of twenty pages. The Clerk of Court already filed the response, and the Court considered Petitioner's response in addressing his grounds for relief. Therefore, Petitioner's motion to file a response in excess of twenty pages [docket entry #43] is **GRANTED**. LR 7.1(c)(3).

/s/ _____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

Dated: May 31, 2001

District Court Memorandum Opinion and Order and Judgment - 5/31/01

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 00-CV-71091-DT

TERRY D. ALTMAN,	)
	)
Petitioner,	)
	)
v.	)
	)
ROBERT J. KAPTURE,	)
	)
Respondent.	)
	)

Before: HONORABLE DENISE PAGE HOOD

JUDGMENT

This matter having come before the Court on a Petition for the Writ of Habeas Corpus, United States District Judge DENISE PAGE HOOD presiding, and in accordance with the Memorandum Opinion and Order entered on May 31, 2001,

IT IS ORDERED that the Petition for a Writ of Habeas Corpus is DENIED.

Dated at Detroit, Michigan on May 31, 2001.

DAVID J. WEAVER
CLERK OF THE COURT

By: /s/ _____
DEPUTY CLERK

APPROVED:

/s/ _____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPREME COURT OF MICHIGAN

SC: 112164

[Filed February 25, 1999]

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY D. ALTMAN,

Defendant-Appellant.

OPINION

On order of the Court, the delayed application for leave to appeal from the March 20, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX D

STATE OF MICHIGAN
COURT OF APPEALS

No. 160952

[Filed March 20, 1998]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TERRY D. ALTMAN,
Defendant-Appellant.

On Appeal From
Oakland Circuit Court
LC Nos. 92-115146 FH
92-115042 FC

JUDGES:
Holbrook, Jr., P.J., and Michael J. Kelly and Gribbs, JJ.

OPINION

PER CURIAM.

In LC No. 92-115042 FC, defendant pled guilty to

solicitation to commit murder and solicitation to commit breaking and entering an occupied dwelling, receiving prison sentences of 15 to 40 years and 3 1/3 to 5 years, respectively. In LC No. 92-115146 FH, defendant pled nolo contendere to extortion, for which he was sentenced to serve 5 to 20 years in prison. On these appeals of right, defendant's original brief, untimely filed, raised two issues, a contention that his sentence for solicitation to commit murder is disproportionate to the offense and the offender, and an argument that the prosecutor improperly referred to information from psychological evaluations prepared for determination of defendant's competency at the sentencing proceeding, in violation of defendant's statutory privilege and Fifth Amendment rights. After remand proceedings, defendant asserts through new counsel that he was deprived of the effective assistance of trial counsel in numerous respects, and that the lower court abused its discretion in denying his motion to withdraw his pleas.

With respect to the ineffective assistance of counsel claims, defendant charges that trial counsel failed to properly investigate the case, failed to prepare and investigate insanity and/or diminished capacity defenses as well as an entrapment defense, and pursued ill-chosen strategies and tactics. Following four days of evidentiary hearings before a substitute trial judge, the trial court found that, contrary to defendant's arguments, defendant's trial counsel had investigated the case, as well as insanity, diminished capacity, and entrapment defenses, and, based on the best information available, correctly concluded that no such viable defense could be presented at trial.

As there was conflicting evidence in some respects,

the trial court's findings of historical fact are properly viewed for clear error, while its legal conclusions and its decision concerning any mixed questions of law and fact are properly reviewed de novo. See *People v Burrell*, 417 Mich 439, 449; 339 NW2d 403 (1983). The trial court's historical findings of fact are not clearly erroneous. For example, defendant's forensic expert, Dr. Tanay–although opining a causal relationship between defendant's supposed mental illness and his crimes--failed to establish a basis for asserting an insanity defense or a diminished capacity defense, i.e., Dr. Tanay himself never testified that as a result of a substantial disorder of thought or mood significantly impairing defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, MCL 330.1400a; MSA 14.800(400a), defendant lacked "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." MCL 768.21a(1); MSA 28.1044(1)(1).

The evidence also clearly supported defense counsel's testimony and the trial court's finding that the evidence of defendant's actual conduct so clearly established his specific intent as to each crime as to justify counsel's strategic conclusion that a viable diminished capacity defense could not be presented. *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978). Similarly, where the plan to burglarize defendant's ex-girlfriend's residence to retrieve expensive gifts which defendant had bestowed on her, and to murder a former business associate so defendant could collect the insurance proceeds, both originated with defendant, the mere investigative participation of a police officer, posing as an assassin for hire, could lead at least a minimally competent criminal defense practitioner to the conclusion that a valid

entrapment defense did not exist. *People v Butler*, 444 Mich 965-966; 514 NW2d 772 (1994).

The tactic of precluding the admission of much evidence that would have placed defendant in an extremely poor light at sentencing by pleading guilty or nolo contendere, and of minimizing defendant's mental illness as a basis for avoiding an inference of dangerousness for sentencing purposes, was well within the range of reasonable legal assistance by a competent criminal defense practitioner. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Accordingly, defendant's pleas were knowing, understanding, and voluntary, and defendant was not deprived of the effective assistance of counsel in any respect. *People v Corteway*, 212 Mich App 442, 445-446; 538 NW2d 60 (1995). As no viable defense could be presented, defendant was not called upon to make an informed choice about whether to waive particular defenses, and absent a showing that defendant's pleas were not knowing, voluntary and understanding, the trial court did not abuse its discretion in denying defendant's motion to withdraw his pleas. MCR 6.311; *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

In conjunction with sentencing, defense counsel submitted a psychiatric evaluation by Dr. Abramsky. In rebuttal, the prosecutor referred to the opinions of two forensic psychiatric examiners who had evaluated defendant for competency to stand trial, who opined that defendant's mental illness was essentially feigned. The prosecutor further noted that defense counsel, after initially filing a notice of insanity defense, withdrew that notice. Defense counsel at the time objected on grounds that the prosecutor was

misrepresenting the opinions of the forensic examiners, but now defendant asserts that the use of such evaluations violated his Fifth Amendment privilege against self-incrimination and his statutory privilege not to allow the use of competency evaluations for any other purpose under MCL 330.2028(3); MSA 14.800(1028)(3). We reject these contentions.

First, because the objections now advanced were not presented to the trial court at the time of sentencing, the issue is unpreserved. Second, if defendant had a privilege, it was waived when defendant chose to introduce his own psychiatric evaluation. *People v Garland*, 393 Mich 215, 218-219; 224 NW2d 45 (1974). Third, the statutory privilege is limited to preventing use only of the opinion concerning competency, *People v Dobben*, 440 Mich 679, 692; 488 NW2d 726 (1992); as the prosecutor did not refer to the opinions concerning competency, but rather to observations and findings concerning the existence of mental illness, the statute was not violated. Fourth, defendant's guilt had already been established by plea, and this was the sentencing phase, not the guilt determination phase of the proceedings. Defendant's Fifth Amendment arguments are therefore misdirected. *People v Wright*, 431 Mich 282, 286; 430 NW2d 133 (1988).

Finally, with regards to defendant's challenge to the proportionality of his sentence for solicitation to commit murder, the facts of the case establish that the murder was not only one for hire, but that the motive was financial. Defendant wished to kill a former business associate in order to collect life insurance proceeds and pay off his own (defendant's) debts. There are no guidelines applicable to this offense, which is punishable by imprisonment for life or any term of years. MCL 750.157b(2); MSA 28.354(2). Although

the offense is inchoate, and no one was actually killed or even injured, the offense is nonetheless extremely heinous. See *People v Jahner*, 433 Mich 490, 498; 446 NW2d 151 (1989). In *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992), this Court upheld a prison sentence of 40 to 60 years for the same offense, rejecting a contention that the sentence was excessive because the supposed killer would never have carried out the act. We likewise conclude that defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Roman S. Gribbs

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

Nos. 92 115042 FC and 92 115146 FH

[Dated March 7, 1997]

PEOPLE OF THE STATE OF MICHIGAN,	)
Plaintiff,	)
v.	)
TERRY D. ALTMAN,	)
Defendant.	)

JOHN PALLAS (P42512)
ASSISTANT PROSECUTING ATTORNEY
1200 N TELEGRAPH RD
PONTIAC MI 48341
(810) 858-0681

EVAN H. CALLANAN, JR. (P30564)
ATTORNEY FOR DEFENDANT
217 W ANN ARBOR RD STE 302
PLYMOUTH MI 48170
(313) 453-7877

Michigan Circuit Court Opinion - 3/7/97

OPINION REGARDING DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland and State of Michigan, on March 7, 1997.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This matter is before the Court pursuant to a remand order of the Court of Appeals for an evidentiary hearing on the issue of effectiveness of counsel. Having held the hearing on September 11, 17, 19 and 20, 1996, and having reviewed the exhibits, and the Proposed Findings of Fact and Conclusions of Law submitted by both parties, the Court makes the following determinations.

In 1991, Defendant, then approximately thirty-eight years old, took a leave of absence from his position as Senior Vice President at Dean Witter because he suffered from depression. At that time, Defendant was divorced and the custodial father of his two teen-aged sons. He had a history of mental health treatment, from 1977 to 1982, and again from 1987 or 1988 through the date of his arrest. At the time of the allegations discussed below, he was in treatment with mental health professionals and was taking prescription narcotics.

Defendant had become acquainted with an employee of a local gas station, Frank Partita, an ex-convict, and in 1991, Defendant began soliciting Partica to break and enter

into the apartment of Defendant's ex-girlfriend for the purpose of stealing expensive items that Defendant had given to the ex-girlfriend as gifts, and also possibly to disfigure the ex-girlfriend. (September 17, 1996 transcript, PM session, p 29.) Defendant also stated that he might want to have a former business associate killed. (Id., 28, 29.)

Partica contacted the Michigan State Police, and Sgt. C.J. Maier was assigned to investigate. With Partica's assistance, Maier posed as a former fellow ex-convict who was available to perform the criminal acts solicited by Defendant. (People's Exhibit 11.) Defendant contacted Maier and they met at a local restaurant in January, 1992. (People's Exhibit 9.)

Defendant introduced the subject of Partica and the apartment job. (People's Exhibit 9, pp. 14-15.) Defendant described what he wanted Maier to do. (Id., p. 27.) When Maier asked Defendant if he wanted Maier to just rob the apartment, or also to hurt the ex-girlfriend or "put her away", Defendant responded: I got another guy, I'd wanna put away. I got another guy who I'll put away." (Id., p. 28) Defendant also stated he did not want to physically hurt his ex-girlfriend. (Id., p. 29.) Finally, Defendant expressed concern about Maier doing a "clean" job so that it would not come back to him, and also discussed his expectation of police contact after the completion of the B and E, and how he had been practicing looking "dumb". (Id. 31, 34.)

After Maier had supposedly completed the B and E, Maier and Defendant met again, on January 27, 1992. After they had discussed the details of the supposed B and E, Defendant solicited Maier to kill a former business associate.

(People's Exhibit 10, p 12, 18.)

Defendant stated his intention to collect on an outstanding insurance policy on the intended victim and to use the policy benefits to pay off outstanding debts. (Id. at 16, 17.) Maier and Defendant negotiated payment terms for the murder, and then proceeded in separate cars to Defendant's bank, where he withdrew the money, drove down an alley, left the money in an envelope on a telephone pole, pointed to it, and drove away. (Id. at 24-26.)

Defendant was arrested as he left the scene and was charged with one count of solicitation of murder and one count of solicitation of breaking and entering an occupied dwelling. In a separate case, he was charged with one count of extortion. Defendant was incarcerated in the County jail, where he reported a suicide attempt. He was seen by a mental health services psychiatrist, Dr. Jain, who diagnosed him as suffering from major depression, single episode. She recommended a suicide watch, counseling, and that he be started on medication. (Defendant's Exhibit H.)

Defendant retained counsel, Kenneth M. Mogill, an extremely experienced and highly regarded criminal defense attorney, who began exploring potential entrapment and mental state defenses. (September 11, 1996 transcript, p 65.) After both cases were bound over to this Court for trial, Mogill filed a notice that he intended to raise an insanity defense on Defendant's behalf. Thereafter, an order was entered for Defendant to undergo an examination on criminal responsibility at the Center for Forensic Psychiatry. However, shortly after the examiner commenced the interview, she requested that Defendant's attorney seek a retroactive order

for competency to stand trial, for the reason that "his current depressive presentation precluded adequate communication with him in order to attempt to answer the question regarding criminal responsibility". (Defendant's Exhibit B, p 4.) The examiner found him incompetent to stand trial at that time, (Id., p 3), but added that, with treatment, there is a reasonable likelihood that Mr. Altman will be restored to competency to stand trial within the statutorily permitted time limit." (Id., p 4.)

A competency hearing was conducted on May 27, 1992, and the examiner testified that she found Defendant incompetent to stand trial, but admitted she did not review any of his records. (People's Exhibit 1, p 16.) She also admitted on cross examination that the possibility of malingering always existed, and that there would be no harm in obtaining another opinion. (People's Exhibit 1, p 20.) At the conclusion of the hearing, Mogill argued for a finding of incompetence, and stated that he was having trouble communicating with his client. The Court ordered an independent examination and adjourned the hearing for one week. (Id. p 41.)

An independent exam was then conducted, and the examiner concluded:

> It is my considered opinion that Mr. Altman is not experiencing any genuine and incapacitating mental condition. Mr. Altman is feigning mental illness. His complaint and presentation of symptoms are not credible; they do not correspond to any recognizable mental condition other than malingering. ***

> In my opinion, to a reasonable degree of certainty, Mr. Altman is competent to stand trial ...(People's Exhibit 8, p 7.)

The competency hearing was continued on June 24, 1992. (People's Exhibit 2.) The independent examiner testified consistent with his written report. At the conclusion of the hearing, Mr. Mogill asked the Court to refer Defendant to the Forensic Center for another opinion, to help resolve the conflict in opinion between the first two examiners, and to allow Mr. Mogill more time to determine the necessity of calling Dr. Jain, the jail psychiatrist, as a witness. The People agreed, and the Court granted Mr. Mogill's request.

On June 30, 1992, Defendant was again examined at the Center for Forensic Psychiatry by a third examiner. The examiner stated:

> To summarize, at the time of the current evaluation, Mr. Altman attempted to present himself as extremely impaired: in particular, he acted extremely depressed, described extensive memory impairment, and reported auditory hallucinations. As noted above, Mr. Altman's presentation was not internally consistent and was not congruent with genuine psychological disturbance. It appeared instead to reflect Mr. Altman's understandable efforts to extricate himself from his legal situation.

The examiner went on to conclude that Defendant was competent to stand trial.

On July 1, 1992, Defendant's competency hearing was continued. Neither Mr. Mogill nor Defendant were present, however the assistant prosecutor put a stipulation on the record, with Mr. Mogill's permission, that the Court may receive into evidence People's exhibit 1, the report from the third expert, that is Dr. Carol Holden, ... and we've agreed that you may decide the case based on the testimony that you've already heard plus this report. I have agreed with Mr. Mogill, since he won't be here today, not to offer any argument that he can't respond to." (People's Exhibit 3 at pp 2-3.) The Court received the third report into evidence, reviewed the testimony of the first two examiners, and summarized the content of the third report before finding Defendant competent to stand trial. (Id., pp 4-5.)

Although Mr. Mogill did not request another order for a criminal responsibility examination of Defendant, he did arrange for a private psychologist, Michael F. Abramsky, to examine Defendant. Mogill had retained Dr. Abramsky in a number of other cases and he had a lot of confidence in him. (9/11/96 transcript, PM Session, p 69.) Dr. Abramsky first examined Defendant on March 21, 1992, almost two months before the first of the three court-ordered examinations took place. Dr. Abramsky also examined Defendant on August 29 and October 31. (Defendant's Exhibit E, Attachment A, p 1.) In addition, he reviewed all of Defendant's records. (Id. at pp 1-2.)

His report, which was presented to the Court at the time of sentencing, states: "The clinical interviews went toward establishing Mr. Altman's current mental state, his competencies and his mental state at the time the alleged crimes were committed. ... The most intense effort went

toward establishing Mr. Altman's mental state during the time alleged crimes were committed.(Emphasis added.) (Id. at p 1.) Later in his report, Dr. Abramsky concludes: "While certainly not meeting the statutory requirements for insanity, there is little doubt in this examiner's mind that he was mentally ill at the time" [the alleged crimes were committed]. (Id. at p 6.) Dr. Abramsky also concluded that Defendant was competent to stand trial. (Id. at p 2.)

In light of Dr. Abramsky's conclusions, and because he was unable to find another expert to testify that Defendant met the statutory requirements for insanity at the time the crimes were committed (9/11/96 transcript, P.M. Session, p. 32), Mr. Mogill concluded that Defendant had no insanity defense. He also concluded that Defendant did not have an entrapment or diminished capacity defense, (Id. at 34) and he recommended to Defendant that he enter a plea to all of the charges. Defendant then retained Larry Kaluzny as co-counsel. Mr. Kaluzny is also a very experienced and highly regarded criminal defense attorney. Mr. Kaluzny reviewed the case and also advised Defendant to enter a plea.

On November 12, 1992, Defendant pled guilty to both of the solicitation charges and no contest to the extortion charge. He was sentenced on December 16, 1992 to 15 - 40 years on the solicitation of murder conviction, 40 mos. - 5 years on the solicitation of breaking and entering conviction, and 5 - 20 years on the extortion conviction. Defendant appealed as of right to the Court of Appeals alleging ineffective assistance of counsel.

Defendant argues that he was deprived of effective assistance of counsel because his attorneys failed to prepare

an insanity or diminished capacity defense, and failed to prepare an entrapment defense.

In People v LaVearn, 448 Mich 207, 216 (1995), the Michigan Supreme Court summarized the defendant's burden in relation to an ineffective assistance of counsel claim as follows:

> In *Strickland*, the United States Supreme Court stated that a claim of ineffective assistance of counsel requires a showing that "counsel's performance was deficient" and a showing that "the deficient performance prejudiced the defense." 466 US 687.

When reviewing an ineffective assistance of counsel claim in the context of a guilty plea, the issue is whether the defendant tendered the plea voluntarily and understandingly. People v. Corteway, 212 Mich App 442, 445 (1995).

In Corteway at 446, the Court stated:

> The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision .... The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea.

Defendant argues that he did not make an informed

voluntary choice to plead guilty because his trial counsel failed to prepare and pursue meritorious mental state defenses, failed to prepare and purse an entrapment defense as to the solicitation of murder charge, and advised him that he had no defenses. In support of his argument regarding the insanity defense, Defendant cites numerous cases holding that an attorney's failure to adequately prepare and pursue a meritorious insanity defense may deprive a defendant of effective assistance of counsel. In one of those cases, People v. Newton, 152 Mich App 630, 634 (1986), the court stated: "Although a failure to prepare and pursue a meritorious insanity defense constitutes ineffective assistance of counsel, this Court will not reverse a conviction on this basis if it is persuaded that there is little chance of success had the insanity defense been raised. . . . Similarly, we will not reverse where failure to raise an insanity defense is a question of trial strategy."

In the instant case, this Court finds that defense counsel did investigate and consider an insanity defense, that Defendant did not have a meritorious insanity defense, that there would have been little chance of success had the insanity defense been raised, and that the decision not to raise an inanity defense was also part of a sound strategy. Accordingly, the Court finds that Mr. Mogill's assistance enabled Defendant to make an informed and voluntary choice between trial and a guilty plea.

First, Mr. Mogill did investigate and consider an insanity defense. He retained Dr. Abramsky, he requested a criminal responsibility exam, he communicated with Defendant's private doctors who were treating him at the time of the criminal acts, and he communicated with the first court-

ordered examiner who found Defendant incompetent to stand trial. However, he decided not to pursue the insanity defense for a number of valid reasons: he was unable to find an expert witness to testify making the defense moot (9/11/96 Transcript, PM Session p. 32); he believed an insanity defense would have been hampered by a prosecution expert testifying about "the evidence of malingering" that had come out during the competency hearings (Id. at 71-72) he felt the insanity defense would also be hampered due to a letter or report received from one of Defendant's private treaters, who was treating Defendant at the time of the criminal acts, which would have "severely undercut" the defense of insanity (Id. at 75, 82); he believed the "emotional flow" of the testimony of Defendant's intended victims, Lori Trimble and Tim Napier, would have been very much against the defense [of insanity]" (Id. at 72); his memory was that the first court-ordered examiner would not have continued to maintain her prior opinion if called as a witness (Id. at 57, 71); and, he believed an insanity defense would have blown up in Defendant's face and hurt him and Defendant would have ended up with a much more severe sentence (Id. at 72, 82-83).

Mogill also thought a plea was advisable because the prosecution intended to use MRE 404(b) other acts evidence at trial which would have been compelling to a jury, and by pleading, Defendant avoided disclosure of this evidence. He also thought a plea was advisable because he could present his expert's report in a sentencing package to the court where his expert witness would not be subject to cross-examination.

As to a diminished capacity defense, Mr. Mogill

testified he believed it to be inappropriate, because that defense goes to whether the defendant had the capacity to form the specific intent to commit the acts for which he was charged and "the evidence is overwhelming as to him being specific as to what he did, and did not want." (9/11/96 transcript, PM Session, p. 53.)

A review of the transcripts of conversations between Defendant and Partica, and Defendant and Maier, being People's Exhibits 9-11, supports Mogill's conclusions as to both the lack of an insanity defense and the lack of a diminished capacity defense. Defendant appears to be rational, to be specific as to both means and outcomes, to be aware of the risks, and to have formulated a plan if contacted by the police.

Further, a review of the cases cited by Defendant in support of his argument on the insanity defense discloses that none of them are on point. Almost all of them involved a defendant with a history of mental illness and a trial counsel who failed to obtain a criminal responsibility examination and/or failed to present witnesses on the issue of insanity. Here, by contrast, Mogill did move for a criminal responsibility exam, did obtain Dr. Abramsky's opinion on criminal responsibility, and did determine that Defendant's private doctor and the court-ordered examiner who found Defendant incompetent to stand trial would not support an insanity defense. There was also evidence of malingering in this case, where there was no such evidence in the cases cited By Defendant.

As to the entrapment defense, Mogill testified that he

did not pursue it for the following reasons: he carefully evaluated the case law on entrapment and the transcripts cited above; he noted that Defendant first raised the issue of killing Tim Napier (the business associate) with Partica; that Defendant next solicited Maier for the killing; and that the likelihood of success with this defense was non-existent and would have been a waste of money. (9/11/96 transcript, PM Session, p 74.) Having reviewed the transcripts cited above, the Court finds that they support Mogill's analysis.

Defendant also argues that the statutory requirement of a competency hearing was not adhered to. MCL 330.2030(1) states in relevant part: "Upon receipt of the written report, the court shall cause the defendant to appear in court and shall hold a hearing within 5 days... ." In support, Defendant cites People v Ponder, 57 Mich App 94 (1974), which held that the statute makes it mandatory for a trial court to hold a hearing on the question of competency.

Defendant complains that the Court did not comply with the hearing requirement because neither Defendant nor his counsel were present at the final hearing and the third competency report was allowed to he admitted into evidence. However, as detailed above, the Court held a three-part competency hearing on Defendant's behalf, and the manner in which the final part was conducted was by stipulation. Mr. Mogill testified that he did not attend the hearing and stipulated to admit the report into evidence because the outcome of the hearing was foregone. (9/11/96 Transcript PM Session, p 55.) Defendant has not argued that his presence or his counsel's presence at the final part of the hearing would have altered the outcome. Ponder only requires that the Court hold a competency hearing, which the Court did; it does not

prohibit defense counsel from entering into a stipulation to admit the report in its absence.

For all of the reasons cited above, the Court finds that Defendant was not deprived of the effective assistance of counsel.

/s/ _____
RICHARD D. KUHN,
CIRCUIT JUDGE

APPENDIX F

CENTER FOR FORENSIC PSYCHIATRY

Name ALTMAN. Terry D. CFP No. 75654

Date
06/30/92
C. Holden
km

On this date, I spoke with Robert Hedges of the prosecutor's office and informed him that I would be recommending Mr. Altman as Competent to Stand Trial. After some discussion about whether my testimony would be necessary, he contacted the defense attorney and retelephoned me to let me know that my testimony would not be required if the report could be FAXed to the two of them by noon, July 1.

Mr. Hedges also mentioned that Dr. Michael Abramsky had been interviewing Mr. Altman in the jail regarding his criminal responsibility. Mr. Hedges and I discussed additional information which it would be useful for the person doing the CR to have, in particular, copies of the tape recording made by the undercover officer during the alleged solicitation to murder and/or transcripts of such tapes. Mr. Hedges mentioned that Mr. Altman sounded "out of it" on the tape,

so I indicated that the audio tapes themselves would be particularly useful.

/s/ _____
Carol E. Holden, Ph.D.
Consulting Forensic Examiner
Assistant Director, Evaluation Unit

7/22/92

Sent to Oakland County Jail, Inmate Services, 1201 N. Telegraph. Rd. Pontiac, Michigan 48053, copy of letter to court on Competency 7/1/92.

/s/ _____
Peggy S. Ray, A.R.T
Medical Record Examiner

1/20/99

On today's date, copies of requested information from the CFP Medical Records were copied and sent to Errol Keith, Attorney for the above-named individual. These copies were sent pursuant to Act 258 of 1974, supplemented through Act 152 of the 1996 Regular Session of the Michigan Legislature, 330.1748, Section 748 6b. Refer to green note work sheet attached to the release authorization for a list of the copies sent.

/s/ _____
Peggy Ray, ART
Medical Record Examiner